EARTHJUSTICE

October 30, 2018

VIA ELECTRONIC AND U.S. MAIL

Acting Administrator Andrew Wheeler
U.S. Environmental Protection Agency
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Dear Acting Administrator Wheeler:

This is a petition to stay, pending judicial review, the effectiveness of final action taken by EPA at 83 Fed. Reg. 36,435 (July 30, 2018) and entitled "Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Amendments to the National Minimum Criteria (Phase One, Part One)" ("Phase I Rule"). The parties submitting this petition are Clean Water Action, 1444 I Street NW, Suite 400, Washington, DC 20005; HEAL Utah, 824 S 400 W, Suite B111, Salt Lake City, UT 84101; Hoosier Environmental Council, 3951 N. Meridian, Suite 100, Indianapolis, IN 46208; Prairie Rivers Network, 1605 South State Street, Suite 1, Champaign, IL 61820; Sierra Club, 2101 Webster St, Suite 1300, Oakland, CA 94612; and Waterkeeper Alliance, 180 Maiden Lane, Suite 603, New York, NY 10038 (collectively, "Petitioners"). Petitioners specifically request that you stay the effectiveness of the Phase I Rule with respect to the provisions that extend closure deadlines for unlined impoundments that cause contamination exceeding a groundwater protection standard, 40 C.F.R. § 257.101(a)(1), and for impoundments that violate the location restriction concerning placement of coal ash above the uppermost aquifer, *id.* § 257.101(b)(1).

EPA finalized these deadline extensions without ever proposing them in the *Federal Register*. EPA's action delays for over eighteen months the closure or retrofit of coal ash ponds leaking arsenic, lead, and other toxic contaminants into groundwater, even though EPA found in 2015 that closure is "the only corrective action strategy that EPA can determine will be effective" for these sites. *See* Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,302, 21,371 (April 17, 2015) (hereinafter "2015 CCR Rule"). EPA failed to consider the loss of benefits that would result from the deadline extensions and new evidence of groundwater contamination from coal ash disposal units. The deadline extension also runs directly contrary to the D.C. Circuit's recent ruling that allowing unlined impoundments to continue to operate fails to ensure the level of

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protection mandated by the Resource Conservation and Recovery Act. *See Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 429 (D.C. Cir. 2018) [hereinafter *USWAG v. EPA*].

On October 22, 2018, the signatories to this letter filed a petition for review of the Phase I Rule in the D.C. Circuit docketed as Case No. 18-1289. This petition for a stay is filed as a precautionary measure to comply with Fed. R. App. P. 18(a)(1), which states, "A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order." To the extent EPA is willing and able to consider such a request, and to the extent it may be deemed necessary for any reason for Petitioners to submit such a request to EPA before seeking a stay pending judicial review from the D.C. Circuit, we request that the agency act immediately on this request. Please inform the undersigned counsel by 5:00 p.m., on Friday, November 16, 2018, whether the agency will grant our request for a stay.

ARGUMENT

A stay pending judicial review is warranted because (1) Petitioners are likely to prevail on the merits of their judicial challenge; (2) Petitioners' members will be irreparably harmed by this delay if a stay is not granted; (3) a stay will not substantially harm other parties; and (4) the public interest favors a stay. *See Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM BECAUSE THE D.C. CIRCUIT'S RECENT DECISION INVALIDATES THE CLOSURE DEADLINE EXTENSIONS AND THEY ARE ARBITRARY.

The D.C. Circuit's decision in *USWAG v. EPA*, 901 F.3d 414 (D.C. Cir. 2018), holds that the protectiveness standard in Subtitle D of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6944(a), requires EPA to hasten the closures of unlined, leaking impoundments, not further delay them. No other authority allows EPA to delay the closure of those dangerous impoundments. Moreover, EPA finalized the closure deadline extensions without notice-and-comment and then issued them without a reasoned explanation. For these reasons, Petitioners can easily make the required "strong showing that [they are] likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 426 (2009).

The 2015 CCR Rule required that unlined coal ash impoundments initiate closure or retrofit within six months of detecting groundwater pollution at statistically significant levels above a groundwater protection standard. *See* 80 Fed. Reg. at 21,418. The 2015 CCR Rule further required that all coal ash impoundments initiate closure within six months if, by October 17, 2018, the owner or operator of such impoundment failed to demonstrate that its base lies at least five feet above the uppermost aquifer. *See id.* After examining the abundant evidence in EPA's rulemaking record showing that unlined impoundments threaten human health and the environment, the D.C. Circuit concluded that closing or retrofitting unlined impoundments only if they violate an additional restriction fell short of the RCRA Subtitle D protectiveness standard. *See USWAG v. EPA*, 901 F.3d at 427-30 (vacating the portions of the 2015 CCR Rule

that "allow[] for the continued operation of unlined impoundments"); *see also* 42 U.S.C. § 6944(a) (providing that sanitary landfill criteria under RCRA must guarantee "no reasonable probability of adverse effects on health or the environment").

Rather than rectify this legal infirmity, the Phase I Rule exacerbates it. The Phase I Rule extends the closure deadlines from six months after a violation to the much-later date of October 31, 2020. *See* 40 C.F.R. § 257.101(a)(1); *id.* § 257.101(b)(1). If allowing unlined impoundments to continue to operate *at all* violates RCRA, as the D.C. Circuit held, then, *a fortiori*, allowing unlined impoundments to operate more than eighteen months longer than what the D.C. Circuit found unacceptable likewise violates RCRA.[1] Nor is EPA able to point to any other authority, under RCRA or otherwise, that would authorize an eighteen-month extension of the closure deadlines in the 2015 CCR Rule consistent with the Subtitle D protectiveness standard.

The closure deadline extensions also violate notice-and-comment requirements and are arbitrary. EPA did not propose the extension of the closure deadlines. Instead, EPA sought comment on extending the underlying *compliance* deadlines. That is, EPA proposed extending the date for operators to certify that their impoundments complied with location restrictions, *see* 83 Fed. Reg. at 11,598, and enlarging the timeframes for groundwater assessment monitoring, *id.* at 11,599. EPA never proposed leaving the substance of the 2015 CCR Rule in place but simply extending the closure deadlines by a further eighteen months. As a result, the rationales that EPA now advances in support of the closure deadline extensions appeared nowhere in the proposed rule, and Petitioners and other members of the public had no opportunity to comment on them. Moreover, as EPA previously found, "CCR units present significant risks, and it is critical that facilities complete closure expeditiously—particularly those that are closing because they are structurally unsound or are contaminating groundwater." 80 Fed. Reg. at 21,419. No corrective action short of closure is effective for unlined impoundments and impoundments sited too close to groundwater. Delaying closure further is both arbitrary and unlawful.

II. THE CLOSURE DEADLINE EXTENSIONS WILL IRREPARABLY HARM PETITIONERS IN THE ABSENCE OF A STAY.

These delays will cause irreparable harm to Petitioners' interests in their members' health and a healthy environment. Judicial review of the Phase I Rule could easily extend over a year. For instance, judicial review of the 2015 CCR Rule lasted from July 2015, when initial petitions for review were filed, until October 15, 2018, when the D.C. Circuit issued its mandate—a period of over three years. *See* Mandate, ECF No. 1755203, *USWAG v. EPA*, 901

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[1] The fact that EPA finalized the Phase I Rule a few weeks before the court's ruling does not save the closure deadline extensions, because the decisions of federal courts have retroactive effect. *See Nat'l Fuel Gas Supply Co. v. Fed. Energy Reg. Comm'n*, 59 F.3d 1281, 1287 (D.C. Cir. 1995) ("[T]he decision of a federal court must be given retroactive effect regardless whether it is being applied by a court or an agency.").

F.3d 414 (D.C. Cir. 2018). Even if review of the Phase I Rule proceeds more quickly, each day that passes now constitutes a delay of crucial protections. The deadline to certify location above the uppermost aquifer was October 17, 2018. 40 C.F.R. § 257.60(c)(1). The deadline for existing unlined impoundments to complete groundwater assessment monitoring fell on the same date, 42 months after the promulgation of 2015 CCR Rule. *Id.* §§ 257.90(b)(1); 257.93(h)(2); 257.95(b); 257.95(d)(1). As a result, but for the Phase I Rule, the original six-month closure deadline would now be counting down for impoundments that violate either provision. Only a partial stay of the Phase I Rule can put these utilities back on a lawful compliance timeline while this litigation is pending.

Petitioners' members live, work, and recreate in areas where decades of careless disposal of coal ash has harmed, and continues to harm, their health, their enjoyment of their property, and their ability to recreate safely. The chemicals in coal ash cause cancer and other adverse health impacts, and the selenium in coal ash impairs aquatic environments and accumulates in the bodies of fish, amphibians, and the wildlife that feed on them. Unless the closure deadline extensions are stayed, harms to Petitioners' members are "certain and great," "actual and not theoretical," "beyond remediation," and so "imminent that there is a clear and present need for equitable relief to prevent irreparable harm." *League of Women Voters v. Newby*, 838 F.3d 1, 6-8 (D.C. Cir. 2016). Even the mere potential of exposure to harmful substances can constitute irreparable harm. *See Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 613-14 (D.C. Cir. 1980) (potential that children will be exposed to substances that could harm their health constitutes irreparable harm).

III. A STAY WILL NOT SUBSTANTIALLY HARM OTHER PARTIES.

As the agency responsible for the proper execution of the Resource Conservation and Recovery Act, EPA cannot be harmed by a stay that would prevent it from giving effect to a rule that contradicts the Act and is arbitrary and capricious. *See Nat'l Ass'n of Farmworkers*, 628 F.2d at 615 ("consequences [that] are no different from [an agency's] burdens under the statutory scheme" "do not constitute substantial harm for the purpose of delaying injunctive relief"). Moreover, because the D.C. Circuit decision requires EPA to revise the 2015 CCR Rule to disallow the continued operation of unlined impoundments, *USWAG v. EPA*, 901 F.3d at 429-30, a stay of the deadline extension will not obligate EPA to engage in any rulemaking that it is not already obligated to conduct. Likewise, owners and operators have had ample time to comply with requirements to close unlined coal ash impoundments that leak and impoundments that fail to comply with location restrictions, since the 2015 CCR Rule was published over three years ago on April 17, 2015. *See* 80 Fed. Reg. at 21,302. Furthermore, EPA put operators on notice of both requirements as early as 2010 as the proposed rule contained both requirements. *See* 75 Fed. Reg. at 35,241-43 (location restrictions); *id.* at 35,246-51 (groundwater monitoring and corrective action). For all parties involved, staying the closure deadline extensions would bring clarity, not confusion, to federal regulation of coal ash disposal, by restoring the effectiveness of the 2015 provisions that regulated entities and other stakeholders had previously been planning around.

IV. THE PUBLIC INTEREST FAVORS A STAY.

EPA projected that compliance with the 2015 CCR Rule would realize substantial health and environmental benefits, including reduced incidence of cancer, avoided IQ losses from mercury and lead exposure, aesthetic and recreational enhancements to surface water, and protection of endangered species. Regulatory Impacts Analysis, EPA-HQ-RCRA-2009-0640-12034, at ES-5 to ES-9. Compliance with the revisions to that rule that EPA is now obligated to make following the D.C. Circuit decision, *USWAG v. EPA*, 901 F.3d at 414, should result in even greater health and environmental benefits, as the revisions should require closure or retrofit of dangerous, leaking ash ponds with earlier and/or more certain deadlines than those in the 2015 CCR Rule. In light of the grave dangers to human health and the environment from improperly disposed coal ash, the public interest favors a stay of further delays before closing dangerous coal ash impoundments.

CONCLUSION

For the foregoing reasons, a stay of the closure deadline extensions promulgated with the Phase I Rule is warranted.

As delay of relief promises irreparable harm to Petitioners, we respectfully request that you inform the undersigned counsel by 5:00 p.m., on Friday, November 16, 2018, whether the agency will grant our request for a partial stay.

Dated: October 30, 2018

Respectfully submitted,

/s/ Thomas Cmar

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